why if they are relevant and would have determined the fate of the application in her favour, she had not produced them in the first place. With all respect, it will be going accepted practice to accede to the request, lacking the reasons for the application.

In all the circumstances of the case, we agree with the learned judge that this is not a proper case for the grant of leave. The appeal is according dismissed with costs.

Appeal dismissed.

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Kean Chye & Silvalingam.*

TRIUMPHAL ENTERPRISES SDN. BHD. v. GAN HEAH SIEW

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Salleh Abas F.JJ.) August 8, 1980 & March 5, 1981]
[Kuala Lumpur — Federal Court Civil Appeal No. 25 of 1979]

Practice and Procedure — Application for specific performance of agreement relating to land — Exchange of property — Whether sale or purchase — R.S.C. 1957, O. 14A.

In this case one Gan Teng Seong since deceased and the appellant entered into an agreement whereby the deceased agreed to transfer a piece of land to the appellant for development purposes. In consideration of the transfer the appellant promised to build certain houses at his cost for the deceased. It appeared that no planning approval had been obtained for the development of the land after a lapse of nearly four years and the respondent sued as executor of the estate of the deceased for specific performance by the retransfer of the land to him. The learned trial judge on an application under Order 14A of the Rules of the Supreme Court, 1957 granted specific performance and the appellant appealed.

Held, allowing the appeal: as there was no monetary consideration for the transaction in this case it was not a sale or purchase within the meaning of Order 14A of the Rules of the Supreme Court, 1957, and summary judgment for specific performance could not be given under that order.

Case referred to:-

(1) *Robshaw Brothers Ltd.* v. *Mayer* [1957] Ch. 125.

FEDERAL COURT.

Joseph Loo for the appellant.

O.C. Lim for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): We allowed this appeal and stated we would give our reasons later. We do so now.

Respondent, Gan Heah Siew alias Gan Chong Ho was the son of deceased Gan Teng Seong who died on May 5, 1974. He was made an executor and as such he sued the appellant for the benefit of the estate.

On July 22, 1973 deceased and appellant entered into an agreement whereby deceased agreed to transfer a piece of land described as E.M.R. 341 Lot 755 in the Mukim of Mentakab in the District of Temerloh, Pahang to appellant for development purposes. In consideration of the transfer appellant promised to build for deceased three double storey shophouses, eleven terrace houses and six semi-detached houses. The entire costs for the construction of the buildings would be borne by appellant. The transfer was to be effected on the execution of the agreement. Under Clause 5 appellant was obliged to submit the lay-out plan to the State Planning or other relevant authority for approval within one month from the date of agreement. Under Clause 6(a) it is provided that in the event of planning approval being refused appellant agreed to re-transfer the land to deceased and the agreement shall cease to have any effect. Upon approval of the plan, appellant shall forthwith apply for conversion and sub-division of the land and for separate titles for each lot. Construction work shall commence three months after approval of the building plans. The agreement shall be binding on the personal representatives of deceased and successors-in-title and assigns of appellant. Deceased duly executed a valid and registrable transfer of the land in favour of appellant and registered it on November 10, 1973.

Respondent alleged that after a lapse of nearly four years no approval had been obtained. So, he claimed for specific performance by the re-transfer of land to him. He also claimed for (a) an order for appellant to bear the costs, fees and taxes in connection with the re-transfer of the land, (b) damages for breach of contract, (c) costs and (d) other reliefs. He claimed to have written several letters to appellant in 1974, 1975 and 1976 through his solicitors but received no answer. On January 25, 1977, his present solicitors wrote to appellant invoking the said Clause 6(a) and asked for re-transfer of the land. Again, there was no response from appellant. By a summons-in-chambers respondent applied for summary judgment under Order 14A rule 1 of the Rules of the Supreme Court, 1957 on the terms of the minutes of proposed judgment annexed. He alleged that the plan produced was prepared in March 1974, about eight months after the execution of the agreement.

Appellant denied that no lay-out plan was submitted. The explanation was given by Yan Sin Min in his affidavit dated November 29, 1978 in the following paragraphs: —

"4. It is not true that no layout plan was submitted by the defendant pursuant to the agreement dated 22nd July, 1973.

5. Before the said agreement was signed and before the land therein referred was transferred to the defendant the plaintiff's father, since deceased, had agreed to the arrangement and the terms as contained in the said agreement.

6. In anticipation of the said agreement and in pursuance of the said arrangement the said deceased did on 17th April, 1973 at the expense of the defendant submit the layout plan to the Town Council of Temerloh and Mentakab for approval. The said layout plan was prepared by Messrs. Lam & Yap, Part II Architects who were in fact employed by the defendant.

7. On 26th June, 1978 I was notified by Messrs. Lam & Yap that the said layout plan had been approved by the said Town Council. I now produce the letter from the said Town Council addressed to Messrs. Lam & Yap indicating approval of the said layout plan, the said letter is annexed hereto and marked as exhibit 'YSM 1'.

8. Having been so notified that the said layout plan had been approved I whereupon engaged Messrs. Syarikat Jurukur Malaysia a firm of surveyor to make an application on behalf of the defendant to the Pemungut Hasil Tanah, Temerloh for the conversion of land use and subdivision of the said land in terms of the approved lay-

out plan. A copy of the said surveyor's application is annexed hereto and marked as exhibit 'YSM 2'.

9. I have been advised and verily believe that the Pemungut Hasil Tanah, Temerloh cannot now deal with the defendant's said application in view of a caveat lodged by the said deceased and one lodged by the plaintiff. In spite of repeated requests the plaintiff has refused to consent to the said application or otherwise withdraw the said caveat."

It was wrong of appellant to remain silent on receipt of the several letters from respondent. This had clearly antagonised respondent into taking action and entering a caveat. The plan seems to have been now approved by the Temerloh Town Council but not as yet been approved by the State Executive Council.

The agreement was clearly badly drafted in the light of facts which could not be disputed by parties. For example, the transfer was effected in November 1973, i.e. four months after the execution of the agreement and not at the date of the execution of the agreement. Also, the plan was submitted under deceased's name before the agreement was made. One of the recitals in the agreement reads: —

"AND WHEREAS the lay-out plan has yet to be approved by the State Planning or other relevant authority."

The implication is clear — that a plan has already been submitted and approval is awaiting. The learned judge had not referred to the said recital. Respondent would not know what deceased had agreed with appellant before deceased died. Because of the caveat appellant could not comply with Clause 7 of the agreement in applying for conversion and subdivision of the land and for separate titles.

It is the submission of appellant that even if there is no defence, specific performance is not the proper remedy. The agreement is not a normal sale and purchase of land but rather an exchange. Also, there are triable issues which could not be settled by affidavits but by a proper trial. Nevertheless, the learned judge in his judgment stated at page 66 of the Appeal Record: —

"But clearly looking at the arguments and facts adduced there had been no compliance by the respondents of the contract in essential matters. Firstly, and the most essential and glaring one, is that the respondents had failed to submit the layout plan to the planning authority for approval within one month of the execution of the agreement. They however said they had done so through the deceased. Indeed such application was made by the deceased himself in his letter...."

Even if the authority has given approval to the plan with less houses that would not affect the agreement so long as requisite number of buildings would be given to respondent by appellant. On the evidence it is not possible to speculate whether deceased might have changed his mind regarding the lay-out plan he submitted earlier before he executed the agreement. This will necessitate explaining away the recital mentioned earlier. The learned judge was right to point out at page 67 of the Appeal Record that: —

"The fact that the agreement was made three months after the said letter (Exh. WHW 1) must give rise inevitably to the assumption that at the time when the agreement was made the parties were aware of the existence of the said letter."

The use of deceased's name was clearly a matter of convenience and in no way should he be made to suffer financially as feared by the learned judge.

Generally, Order 14A applies to specific performance, either by a vendor or purchaser. It is the submission of appellant that where there is no sale or purchase of land specific performance is not appropriate. In *Robshaw Brothers Ltd.* v. *Mayer*[1] the vendor purported to sell certain leasehold property to a purchaser. The purchase price was expressed as "nil." This was done because the property was held at a substantial rent. The consideration for the transfer was the assumption that the tenant would undertake the obligations contained in the lease. Consequently, no money passed. The vendor commenced an action for specific performance and applied for summary judgment under Order 14A of the English Rules of the Supreme Court substantively the same as our corresponding Order 14A. Held, as the sale was not one where money was to pass it was not within the ambit of the order.

In that case Upjohn J., as he then was, had to construe the meaning of "sale or purchase" in relation to Order 14A. He stated at page 132: —

"But I come back to the question of construction. I am really being asked in this case to give to the phrase 'sale or purchase' not its plain *prima facie* meaning of sale or purchase for money, but to cover a transaction for valuable consideration. The Order does not use that phrase. I can find no context which would entitle me to extend the *prima facie* meaning of 'sale or purchase' in this Order. I cannot see how I can enlarge it, for instance, to include an exchange which plainly is not a sale or purchase. Nor, for instance, could I extend it to the case of a transfer in consideration of what is not normally described as a sale or purchase, e.g. marriage. I think that I must give to these words their strict primary meaning, and that is 'sale or purchase in consideration of money.' Accordingly, the preliminary point succeeds, and I must dismiss this application under Ord. 14A."

If there is no monetary consideration for a transaction it is not a "sale or purchase" within the meaning of Order 14A, and summary judgment for specific performance cannot be given under that order.

The decision in *Robshaw Brothers Ltd.* v. *Mayer, supra,* has led to an amendment of the Order 14A in Order 86 of the Supreme Court Practice, which has now been adopted in our Order 81 of the Rules of the High Court, 1980. "An exchange of any property" can now be dealt with in an application for summary judgment. The respondent may now, if he can advise himself of any prospects of success, bring a similar application for summary judgment under Order 81 of the Rules of the High Court, 1980 where he had failed under Order 14A of the Rules of the Supreme Court, 1957.

Accordingly, we allowed the appeal and set aside the judgment. Injunction to continue. Costs in the cause. Deposit to be refunded to appellant.

Appeal allowed.

Solicitors: *Loo Shin Mun & Co.; Chung & Huang.*